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No. 93-1066

In the Supreme Court of the United States

OCTOBER TERM, 1993

AUDIEL HIGAREDA AND GERARDO TREVIÑO,
PETITIONERS

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in denying preliminary injunctive relief to Title VII claimants.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A7-A11) is unpublished, but the decision is noted at 5 F.3d 1495 (Table). The district court opinion (Pet. App. A1-A6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1993. The petition for a writ of certiorari was filed on December 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 28, 1990, petitioner Audiel Higareda filed an internal charge of employment discrimination alleging that his employer, respondent United States Postal Service, retaliated against him and discriminated against him based on "color as related to ethnicity." Compl., Exh. C, at 1. The Postal Service dismissed the complaint initially. Higareda then appealed to the Equal Employment Opportunity Commission (EEOC), and the matter was remanded to the Postal Service. *Id.* Exh. A.

While the administrative proceeding was still pending, Higareda filed a district court complaint against the Postal Service and certain individuals on December 10, 1990. The complaint alleged employment discrimination based on retaliation in violation of Title VII, but stated that the suit was "subject to the completion of administrative conditions precedent." Compl. ¶ 1, at 1. The complaint explained that "[t]he relevant administrative proceedings are still pending," that "[t]his Complaint does not raise the merits of any pending administrative complaint," and that the complaint was "filed for limited purposes of protecting [Higareda's] well-being and rights under the Act; and, to protect and preserve the [EEOC's] jurisdiction in these matters." *Id.* at 1-2. In the complaint, Higareda sought a preliminary injunction "ordering [respondents] to cease and desist in their pattern and practice and retaliation, abuse and harassment in violation of the Act's prohibitions against such retaliation." *Id.* ¶ 21, at 10. The complaint referred to a separately filed motion for preliminary injunction which contained no substantive argument,

but rather consisted of a cursory two-page statement that relied only on the allegations in the complaint as support for issuance of the injunction. See Pltf.'s Mot. for Prelim. Inj. (Feb. 13, 1991).

On April 25, 1991, an amended complaint was filed in Higareda's action, adding petitioner Gerardo Treviño as a plaintiff and adding allegations that the Postal Service had engaged in employment discrimination when it terminated Treviño on February 1, 1991, in retaliation for Treviño's having filed a Title VII Equal Employment Opportunity (EEO) charge. Pet. 2; Am. Compl. ¶ 21, at 9-10. Treviño's factual allegations were unrelated to petitioner Higareda's factual allegations. Procedurally, Treviño alleged that he had filed an appeal with the Merit Systems Protection Board (MSPB) and that the matter was still pending. Am. Compl. ¶ 26, at 11. The amended complaint added a prayer for relief that respondent be ordered to reinstate Treviño. On May 10, 1991, petitioner Treviño settled his termination dispute with the post office. Treviño dismissed his MSPB appeal and the post office restored Treviño as an employee. Pet. App. A4, A9.

On June 25, 1991, respondent moved to dismiss the amended complaint or for summary judgment and opposed petitioners' motion for preliminary injunction. Respondent contended that petitioners failed to state a claim upon which relief could be granted because they had failed to exhaust administrative remedies. This contention was based on the allegations that 180 days had not elapsed between the filing of the EEO complaint and the filing of petitioners' claims in federal court, and that petitioners had not received a final decision from the adminis-

trative proceedings prior to filing suit. Mem. in Supp. of Def.'s Mot. 4-6 (June, 25, 1991). Respondent also argued (1) that to the extent any claims by Higareda had been pending in the administrative proceeding for more than 180 days, Higareda had explicitly precluded federal court consideration of the merits of those EEO charges through his pleadings, and (2) that the only claim that was not then pending in the administrative proceeding had never been submitted by Higareda to the EEO process. *Id.* at 5-6.* As for Treviño, respondent pointed out that he did not even claim to have filed an EEO complaint concerning his termination (*id.* at 6), and that the court had no jurisdiction over the claim he settled with the MSPB. *Id.* at 6-7. Respondent contended that petitioners had failed to state a cause of action under the Federal Torts Claims Act (FTCA) or against individual defendants. *Id.* at 7-9. Respondent also argued that the complaint should be dismissed under Fed. R. Civ. P. 4 due to insufficient service of process. *Id.* at 9-13. Finally, respondent contended that petitioners did not carry their burden for obtaining a preliminary injunction by, for example, failing to demonstrate irreparable harm and failing to specify adequately what action they sought to have enjoined. *Id.* at 14-18.

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* Respondent suggested that "Higareda's otherwise inexplicable pleadings can be explained by EEOC regulation 29 C.F.R. § 1613.283, which mandates termination of the EEO administrative process when a civil suit is filed on the same matter. Here Higareda seems to be engaged in an attempt to obtain relief from this Court without having his EEO complaint dismissed pursuant to the above-cited regulation." June 25, 1991, Mem. 5 n.2.

On November 17, 1992, the district court denied petitioners' motion for preliminary injunction and granted respondents' motion to dismiss. Pet. App. A1-A6. The court reasoned that it lacked jurisdiction to examine the merits of the complaint because petitioners had not exhausted their administrative remedies. *Id.* at A2. The court noted that it appeared that some of Higareda's claims had been pending in the administrative proceeding for more than the 180 days required for exhaustion, but that in his complaint Higareda expressly stated that he did not wish the court to review the merits of those claims at that time. *Id.* at A2-A4. The court also relied on the fact that Treviño had not provided it with any evidence that he ever filed an EEO complaint concerning his termination and on the fact that Treviño had obtained his requested relief through his settlement. *Id.* at A4. The court agreed with respondent that the individual defendants were not proper parties and that the FTCA claims were barred for lack of exhaustion of remedies. *Id.* at A4-A5. The court concluded that, because it lacked jurisdiction, it did not need to reach the service of process issue or the question whether petitioners had met the criteria for injunctive relief. *Id.* at A6.

2. Petitioners appealed the district court's denial of injunctive relief. Pet. App. A7-A8. The court of appeals affirmed. It stated that under *Porter* v. *Adams*, 639 F.2d 273, 276 (5th Cir. 1981), and *Hampton* v. *IRS*, 913 F.2d 180, 182 (5th Cir. 1990), federal courts do not have jurisdiction over federal employees' Title VII claims, including retaliation claims, until administrative remedies have been exhausted. Pet. App. A9. The court stated that claims for

injunctive relief are also jurisdictionally barred under this principle until after administrative remedies have been exhausted. *Ibid.*

In addition, the court held that the district court did not have jurisdiction of Treviño's case because Treviño's appeal to the MSPB had been resolved in his favor by the settlement, MSPB had retained jurisdiction, and therefore "there was no adverse decision from which Treviño could appeal, much less seek injunctive relief." Pet. App. A10. The court of appeals then found that, although Higareda had exhausted his administrative remedies during the pendency of the suit, his request for injunctive relief "failed to specify the ongoing injuries he is suffering, the nature of the defendants' activities sought to be enjoined, why injunction would be a superior remedy to relief at law, and what kind of injunctive relief was sought." *Id.* at A10-A11. The court of appeals pointed out that the denial of injunctive relief was further supported as an equitable matter due to Higareda's failure to verify the complaint, his delay in effecting proper service, and his failure to respond to either the motion to dismiss or the opposition to his request for injunctive relief. *Id.* at A11.

ARGUMENT

1. Petitioners contend (Pet. 7, 17) that the district court and the court of appeals erred in ruling that in order to obtain injunctive relief to enjoin retaliation under Title VII, a claimant "must complete the same conditions precedent relevant to asserting substantive claims under the Act."

To the extent the court of appeals believed that a federal court lacks jurisdiction to grant injunctive

relief to a federal claimant alleging retaliation prior to exhaustion of administrative remedies, it appears to be wrong. See *Wagner* v. *Taylor*, 836 F.2d 566, 570-575 (D.C. Cir. 1987) (in Title VII retaliation case by federal employee, although federal court does not have jurisdiction to issue permanent injunction that would circumvent administrative procedures, it does retain equitable authority temporarily to enjoin retaliation and other acts of reprisal during the pendency of the administrative and judicial review process); *Aronberg* v. *Walters*, 755 F.2d 1114 (4th Cir. 1985); see also *Sheehan* v. *Purolator Courier Corp.*, 676 F.2d 877 (2d Cir. 1981) (in Title VII retaliation case by private employee, federal court has jurisdiction to entertain motion for preliminary injunctive relief against employer retaliation while charge is pending in administrative proceeding). The court of appeals' statement in this regard was, however, not relevant to its decision of the case. In regard to both petitioners, the court articulated other correct bases for denying injunctive relief.

The court of appeals correctly affirmed the district court's conclusion that the merits of petitioner Treviño's claim were not properly before it because he had not obtained an adverse ruling from the MSPB, the MSPB had retained jurisdiction after the settlement, and he had obtained the relief he sought through his settlement. As for Higareda, the court of appeals correctly ruled that it did not have jurisdiction over the merits of Higareda's retaliation claims because Higareda expressly did not submit those claims to the district court. The court of appeals also found that although it appeared that Higareda had exhausted his administrative remedies

during the pendency of the case, his request for injunctive relief was nonetheless properly denied because he failed to specify the ongoing injuries he was suffering or the nature of the actions he sought to be enjoined. Other equitable considerations also militated against an injunction. The court of appeals correctly decided these fact-bound questions. They do not, in any event, warrant this Court's review.

2. Petitioners also contend (Pet. 7-11) that the criteria for preliminary injunctive relief were met in this case because a Title VII plaintiff who has established a prima facie case of retaliation is "generally entitled to injunctive relief unless it can be shown that there is no reasonable expectation that discriminatory conduct will recur, or that the discriminatory effects have been completely and irrevocably eradicated" (Pet. 7), and because the burden in such cases shifts to the defendant to demonstrate that injunctive relief should not be granted.

Petitioners' argument assumes a Title VII plaintiff who has established a prima facie case of retaliation. Petitioners, however, did not make such a showing below. Moreover, in order to be entitled to injunctive relief from the courts below, petitioners had to establish (1) a substantial likelihood of succeeding on the merits of the case; (2) that they would suffer irreparable harm if the injunction was not granted; (3) that the threatened injury to them outweighed any damage to the other parties; and (4) that the injunction, if issued, would not be against the public interest. *Texas* v. *Seatrain Int'l, S.A.*, 518 F.2d 175, 179 (5th Cir. 1975).

The standard of review for a preliminary injunction is whether the district court abused its discretion. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931-932 (1975); *United States* v. *Corrick*, 298 U.S. 435, 437-438 (1936). The district court clearly did not abuse its discretion here where petitioners did not even attempt to meet the applicable legal standard for the issuance of preliminary injunctive relief, but rather filed a cursory two-page motion relying on the unverified complaint as the only factual support for their motion. See Feb. 13, 1991, Mot. Petitioners apparently also did not respond to respondent's opposition to the motion or oppose respondent's motion to dismiss. Pet. App. A11. Finally, as the court of appeals found, petitioners did not describe in any detail the acts sought to be restrained beyond the broad, unverified allegations of their complaints, and in effect simply submitted a request for a general admonishment which cannot support an order for injunctive relief under Fed. R. Civ. P. 65(d). See *Seattle-First National Bank* v. *Manges*, 900 F.2d 795, 800 (5th Cir. 1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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